No. 400

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1945.

UTAH JUNK COMPANY,
Petitioner,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR PETITIONER

KEITH L. SEEGMILLER,
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OPINIONS BELOW

The Price Administrator rendered two opinions, one upon initial consideration of the protest (R. 10-15) and another upon reconsideration (R. 55-63). The opinion of the Emergency Court of Appeals (R. 97-99) is reported in 150 F. (2d) 963.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on August 6, 1945 (R. 100). The petition for a writ of certiorari was filed on September 5, 1945 and granted on November 5, 1945. The jurisdiction of this Court is invoked under Sec. 204(d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 31, 50 U. S. C. App. Sec. 924 (d), as amended.

QUESTIONS PRESENTED

1. Is denial to petitioner of an unqualified right to test the validity of a price fixing regulation, the terms of which purport to prevent petitioner at the peril of heavy penalties from receiving payment of money otherwise lawfully payable to it, deprivation of property without due process of law?

2. Did the Emergency Court of Appeals err in holding that the right to test the validity of a price fixing regulation under the provisions of Sections 203 and 204(a) of the Emergency Price Control Act is conditioned upon the filing of protest before the Administrator amends the regulation to remove the claimed ground of invalidity?

3. Did the Emergency Court of Appeals err in holding in effect that the Emergency Price Control Act permits the imposition of penalties for violation of a price fixing regulation without an opportunity to test the validity of the regulation?

STATUTES INVOLVED

The Statutes involved are those provisions of the Emergency Price Control Act governing the procedure for obtaining relief from the effects of an invalid price fixing regulation. They are contained in Sections 203 and 204 of the Act, 50 U. S. C. App. 923 and 924), in pertinent parts as follows:

Section 923.

"(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision * * *. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after

such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

Section 924

"(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (e), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. * * *

"(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *

"(e) There is hereby created a court of the United States to be known as the Emergency Court of Appeals * * *".

(d) ***The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2 of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.

(e)(1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 205(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court

may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provision of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendancy of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendancy of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

"If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204(b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pur-

suant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

STATEMENT

Petitioner seeks a declaration of invalidity of a price regulation in its application by the Price Administrator to petitioner's sales of fluxing scrap. Unless the regulation is valid to prevent such action petitioner can collect an additional $1.50 per ton for 3048.33 tons of such scrap sold by it to the U. S. Smelting, Refining and Mining Company (hereinafter called the customer) between April 25, 1942, and February 10, 1943. Petitioner invoked the exclusive jurisdiction of the Emergency Court of Appeals by means of the protest procedure provided by Sections 203 and 204(a) of the Emergency Price Control Act (50 U.S.C. App. 923, 924(a)). Its protest filed in the Office of Price Administration on August 7, 1944 was against application of the regulation to sales of scrap for use in lead blast furnaces upon the ground that the regulation, expressly referring to heavy melting steel and making no reference at all to fluxing scrap, in fact did not and was not intended to apply to the latter (R. 2, 4). The Price Administrator apparently assumed valid application of the regulation and denied the protest upon the ground that petitioner sought retroactive relief contrary to the provisions of a valid regulation and not justified as a discretionary matter by any showing of undue hardship or other special circumstances (R. 13-15, 58-63). The Emergency Court of Appeals refused to consider the merits of the protest upon the ground that the procedure followed (that provided by Sections 203 and 204(a) of the Act) is not available to petitioner because the claimed ground of invalidity of the regulation was removed by amendment before the protest was filed (R. 97-99).

The particular provision of the regulation involved is contained in section 1304.13 of Revised Price Schedule No. 4 issued on February 24, 1942 (7 FR 1207). It makes no express provision for a maximum price for fluxing scrap or for any other grade of substantially the same specifications as fluxing scrap. It did provide a maximum price for heavy melting steel which, in practical effect in the industry, constitutes the stock from which fluxing scrap is processed (R. 2, 3, 22-23). The regulation prescribes that heavy melting steel may be in pieces as large as 18" x 60", a grade adapted to use as flux in ordinary steel plants. Fluxing scrap, for use in lead blast furnaces must be cut to sizes not larger than 12" x 24" (R. 26, 28, cf. R. 2, 3, 22-23). When Revised Price Schedule No. 4 was issued there was a well recognized distinction in the industry between melting steel and fluxing scrap and an established price differential reflecting the cost of processing melting steel to fluxing scrap specifications (R. 28, cf. R. 22-23).

Thus the regulation would seem to mean that it prescribed a maximum price for unprocessed scrap, leaving unaffected by that regulation the permissible added charge for the service of processing. Petitioner did not regard the regulation as applicable to its sales of fluxing scrap which it continued to sell to its customer at the price fixed by agreement between them until April 25, 1942 (R. 4),

*The regulation had in fact been regarded in the industry as not applicable to fluxing scrap over a much longer period. It was originally issued on April 3, 1941, by the Price Stabilization Division of the Advisory Commission to the Council of National Defense as Price Schedule No. 4 (6 FR 1767). After creation of the Office of Price Administration on January 30, 1942 (Oct. 2 Supp., 204 Stat. 2), the schedule was reissued without change so far as here pertinent, on February 24, 1942, as a regulation of the Administration. The Price Stabilization Division which had originally issued the regulation, seems not to have regarded it as applicable to fluxing scrap at least it does not appear that there was any effort by that Division to enforce any such application of it.

On and about that date the Office of Price Administration notified petitioner and its customer that the maximum prices for heavy melting steel were applicable also as the maximum prices for fluxing scrap and that petitioner's sales of fluxing scrap for a price in excess of the prices for melting steel were in violation of the statute (R. 4, 27).

Thereafter until February 10, 1943, petitioner continued to sell fluxing scrap to its customer, billing it for their agreed price but collecting only an amount equal to the maximum price fixed by the regulation for heavy melting steel. Under the law as then existing petitioner could not have filed a formal protest to challenge the validity of the regulation since the law permitted a regulation to be protested only within 60 days from the date of its issuance (Ch. 26, sec. 203, 56 Stat. 31), 60 days from February 21, 1942 in the present case, (R. 56; 7 FR. 1207). Nevertheless, petitioner immediately sought, through informal negotiations with the Office of Price Administration, to have the announced construction of the regulation set aside or modified (R. 5-7, 27-28).

On June 30, 1944, the statute was amended to permit the filing of a protest at any time, abolishing the 60 day limitation period theretofore existing (Ch. 325, sec. 106, 58 Stat. 638; 50 USC. App. 923). On the same day that the time limitation upon the filing of a protest was thus removed, the Office of Price Administration amended Revised Price Schedule No. 4 to allow a processing charge on sales of fluxing scrap in the amount of $1.50 per ton (9 FR. 7330). As thus revised, petitioner concedes the regulation is valid.

Petitioner's protest was filed on August 7, 1944, timely by reason of the amendatory legislation of June 30, 1944, but more than a month after the validating amendment to the regulation on the latter date. The Administrator considered the protest twice, once in an opinion dated October 26, 1944 (R. 10-15), and upon reconsideration in an opinion

dated April 4, 1945 (R. 55-63). On both occasions the merits of the protest were considered by him without question as to his power under the statute to grant any relief found by him to be justified. The Emergency Court of Appeals dismissed the complaint upon the authority of its earlier decision in *Thomas Paper Stock Co. v. Bowles*, 148 F. (2) 831, holding that the Administrator's power to grant retroactive relief "is purely incidental to the Administrator's power to deal with an existing regulation and that it cannot be invoked by a protest which merely requests retroactive relief based upon an objection to a regulation which has already been met by its modification or rescission."

SUMMARY OF ARGUMENT

The court below erred in holding that the right to protest a regulation of the Office of Price Administration under the provisions of section 203 of the Price Control Act ceases with amendment of the regulation removing the grounds for protest. This holding ignores the plain provisions of the statute that a protest may be filed at any time by anyone "subject to" the regulation since the regulation protested presently restrains petitioner from enforcement of a valuable contract right, the right to collect in the amount provided by contract for fluxing scrap metal sold and delivered by petitioner before the regulation was amended.

The holding of the court below ignores also the apparent purpose of Congress in amending the statute on June 30, 1944 to remove a sixty day time limitation upon the filing of protests. In the present case, as undoubtedly in many others, the need for filing a protest against a regulation could not have been realized until enforcement proceedings for violation of it, after the expiration of sixty days, were threatened. The injustice of this situation would be cured by granting, as was done, the right to file protest at any time. The additional bar urged in this case leaves the injustice uncured. There is no language in the statute

expressly providing the bar here raised and since the existence of it would defeat the Congressional purpose in removing the sixty day limitation, Congressional intention to provide it may not be inferred. Moreover, the results flowing from the construction urged on behalf of respondent are so discriminatory and unfair that they may not be regarded by implication as intended by Congress.

Prior to amendment of the legislation here involved the Administration had construed the statute as permitting consideration of a protest filed after the grounds for protest had been removed by amendment. In amending the legislation without change in this respect Congress is presumed to have approved the practice.

As construed by the court below the statute permits imposition of penalties for violation of a regulation without opportunity to test the validity of it, a result prevented by the due process clause of the Constitution. This construction is not required by the terms of the statute and under established principles of statutory construction will be avoided.

ARGUMENT

The Emergency Court of Appeals has misconstrued the statute. Its decision (a) denies effect to the statutory language; (b) denies effect to the apparent purposes of Congress, (c) rests upon a construction opposed to that adopted by the officials administering the Act, and (d) rests upon a construction which would render the statute unconstitutional.

(a) The statute provides that "at any time after the issuance of any regulation or order * * * any person subject to any provision of such regulation or order" may file a protest. The Congress provided no other condition or restriction and the additional bar set up in the opinion of the Court below cannot, we believe, be reconciled with this statutory provision. That petitioner is "subject to" the

regulation here challenged seems clear. It has a contract with its customer which though fully executed on the part of the petitioner remains executory in part as to the customer. The executory portion is binding and enforceable unless the challenged regulation prevents enforcement. As far as petitioner's rights under the contract are concerned, it is of no consequence that the regulation has been amended. The present restraint upon petitioner flows from the provisions of the regulation prior to the amendment and for the purposes of such restraint they continue effective.

We submit that petitioner is "subject to" the regulation also under the plain provisions of the Administrator's definition of the term. Section 24 of Revised Procedural Regulation No. 1 provides:

> "A person is, for the purposes of this revised procedural regulation, subject to a provision of a maximum price regulation only if such provision prohibits or requires action by him. * * *" (9 FR. 5791).

Petitioner's sole complaint here is that the regulation "prohibits action" by it. In this respect it is significant that when the time for filing a protest was limited to sixty days, enforcement proceedings likely lagged behind the expiration of that period. At least that was true in the present case in which the time for filing a protest had expired before the Administration made known its view that petitioner was violating the regulation. Under the law as it then was petitioner had a choice between stopping business entirely, operating at substantial loss, or risking violation of the regulation without any right whatever, under the holding of the court below, to test the validity of it.

In his opinions upon the protest in this case the Administrator proceeded upon the view, of course, that the regulation, although amended, presently restrains petitioner in accordance with the terms of it prior to the amendment.

If petitioner should now accept additional payment for the fluxing scrap sold by it prior to February 10, 1943 the penal provisions of the statute would undoubtedly be invoked by the Administration. We submit that the respondent cannot hold the regulation as a club over petitioner's head on the one side and on the other deny that petitioner is subject to it.

(b) The apparent purpose of Congress in the repeal of the sixty day limitation upon the filing of a protest was that of permitting test of a regulation under circumstances of the very nature of those here presented. The time limitation was removed, that is, to make the remedy available to those who did not become aware of the effect of a regulation upon them within sixty days from its issuance. In the present case the regulation was issued on February 21, 1942. It contained no express reference to fluxing scrap or other scrap of substantially the same specifications. In substantially the same form it had been in effect for nearly a year without recognition in the industry of any applicability of it to fluxing scrap and apparently without any attempt to enforce its provisions as fixing maximum prices for such scrap. When on April 25, 1942 advice was given to petitioner that the prices fixed by the regulation for heavy melting steel constituted the maximum prices for fluxing scrap, the time for protesting the regulation had expired.

In the amendatory legislation of June 30, 1944 Congress removed entirely the time limitation upon the right to file protest in brief but unequivocal and sweeping language. Since it thus undertook to remove the only bar created by express language, the implication is not permissible that Congress intended to leave another bar to defeat the purpose of its own action. The impending loss of valuable rights of which petitioner complains is traceable directly to the sixty day limitation period, yet respondent urges, in practical effect, that his own intervening action, con-

cerning which petitioner was entirely helpless, denies any relief to petitioner from the removal of that limitation. The additional bar, sustained by the court below, was not an element of administrative practice when Congress amended the Act in June 1944 (see subhead (c) *infra*) nor, so far as appears, was it otherwise within the thinking of anyone having to do with the legislation.

The bar urged on behalf of the respondent is so discriminatory and unfair that intention on the part of Congress to create it cannot be imputed in the absence of clear language requiring it. In the words of the dissenting opinion in the *Thomas Paper Stock Company* case, "This bar may be raised at any time without any notice by one of the parties to the litigation. Moreover, the majority opinion completely obstructs the right of judicial review despite the existence of substantial rights dependent upon such review."

Under views adopted by the majority in the Emergency Court of Appeals the line is drawn at the point of amendment of the regulation. On the one side there is, under this view, absolute right to seek a declaration of invalidity of a regulation and retroactive nullification of the effect of it. On the other, the right is conditional and discretionary and only as an incident to enforcement proceedings (Sec. 204(e) of the Act; 50 U. S. C. App. 924(e)). There is no sound reason, we believe, why the power so to limit judicial review of his orders should be placed in the hands of the Administrator or why the right to review should be conditioned upon the fortuitous circumstance of amendment or failure to amend a regulation before protest of it is filed.

Time limitations are familiar in the law, of course, but only when they are clearly stated or can be readily ascertained. The idea is novel, indeed, that Congress would provide a time limitation upon a remedy which would vary from case to case in accordance with the progress of busi-

ness in the price administration and which could not be ascertained in advance of its expiration.

(c) When, in enacting legislation, Congress deals with existing law without changing it, legislative acceptance of the administrative construction of it is presumed. *Electric Battery Co. v. Shimadzu*, 307 U. S. 5, 14; *Willis v. Eastern Trust and Banking Co.*, 169 U. S. 295, 307-308; *Peaslee v. Dialogue*, 2 Pet. 1, 18. The bar now raised against petitioner must be found, if it exists at all, in the provisions of the original price control Act of January 30, 1942. As we understand the contentions no claim is made that it was added by amendment thereafter. The inference is inescapable, we submit, that the administrative practice was based upon the view that the Administrator had power to consider the merits of a protest at any time regardless of whether the claimed ground of invalidity had been removed before the protest was filed. At least he considered petitioner's protest twice without question as to his power to grant the relief sought. The second consideration is reflected by an opinion dated April 4, 1945 (R. 55-63) subsequent to the decision in the *Thomas Paper Stock Company* case, holding that the Administrator's power to grant relief "cannot be invoked by a protest which merely requests retroactive relief based upon an objection to a regulation which has already been met by its modification or rescission."

The procedure followed by the Administration in the *Thomas Paper Stock Company* case seems to have been the same as in the present case and no suggestion has been made on behalf of the Administrator that prior to April 1945 he declined to consider any protest on the ground of lack of power by reason of prior amendment of the regulation. Clearly he could not so decline to consider a protest consistently with his regulation defining the term "subject to" (Revised Procedural Regulation No. 1; *supra* 9 F. R. 5791).

The majority holding in the court below as reflected in the *Thomas Paper Stock Company* case rests in major part upon an unduly restricted view of the functions and duties of the Price Administrator. It is said that he may not be diverted from his all important task of price control to consider the validity of a past regulation. But the Administrator cannot avoid considering the validity of such "past regulations" as the one involved in this case and he makes no pretense that he can. The position of the Administrator has been made perfectly plain to this petitioner that if it violates this so-called "past" regulation the enforcement provisions of the statute will be invoked against it. The Administrator would not, of course, institute enforcement proceedings for violation of a regulation without prior determination as to the validity of the regulation in its proposed application. Thus the administrative duty of passing upon the validity of the regulation cannot be avoided. The only question is whether, to obtain such a determination, petitioner must violate the regulation and subject itself to the possibility of heavy penalties with no assurance of right to judicial review of the ruling on validity.

(d) The construction of the statute adopted by the Emergency Court of Appeals constitutes denial of reasonable opportunity to be heard, prohibited by the due process clause of the Constitution. Unless the remedy it invokes in this proceeding is available to it, petitioner has not and never has had any reasonable opportunity to test the validity of the regulation involved. During the sixty days after issuance of it on February 21, 1942 there was no reason for protest by petitioner since on the face of the regulation and, as we believe, under any reasonable construction of it, it fixed no price for fluxing scrap. It could not have been foretold, of course, that what we seek to show was an erroneous application of the regulation would be resorted to by the Administration in support of enforce-

ment proceedings and such proposed resort was not made known until the time for protest had expired. Whether the statute then provided any method for one situated as was petitioner to defend against enforcement proceedings on the grounds of invalidity is at least doubtful. If it did not, it was invalid for denial of due process, we submit. cf. *Yakus* v. *United States*, 321 U. S. 489 in which possible invalidity on such ground was suggested. Abolition thereafter of the time limitation on the filing of protest removed that possibility, unless there existed the additional bar raised in this case. Without such additional bar the absolute right to test the validity of a regulation was made coextensive with liability for violation of it, a result reasonably to have been intended by Congress. Indeed, the idea is shocking that Congress would provide criminal liability for violation of a regulation greater in scope than the right to test the validity of the regulation. With the additional bar raised here the same ground of unconstitutionality remains that was suggested in the *Yakus* case, a result not reasonably to have been intended by Congress.

The conditional right to test the validity of the regulation under the provisions of section 204(e) of the Act as amended on June 30, 1944 (50 U. S. C. App. 924(e)) does not remove the objection. That section provides that in a suit brought for violation of a regulation, the defendant may appeal to the discretion of the court in which the suit is pending for leave to challenge the validity of the regulation in the Emergency Court of Appeals. This alternative procedure permits imposition of penalties for violation of a regulation without an opportunity to test the validity of it and makes possible therefore, the imposition of penalties for violation of an invalid regulation. The opinion in the *Yakus* case clearly indicated that the statute may be construed so as to avoid this result:

CONCLUSION

It is respectfully submitted that for the reasons herein stated the judgment of the Emergency Court of Appeals should be reversed and the case remanded to that Court for decision upon the merits of the protest.

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